

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of CenturyLink for Forbearance)	WC Docket No. 14-9
Pursuant to 47 U.S.C. § 160(c) from)	
Dominant Carrier and Certain <i>Computer</i>)	
<i>Inquiry</i> Requirements on Enterprise)	
Broadband Services)	

**THE REPLY AND OPPOSITION OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY	1
II. DISCUSSION.....	4
A. CenturyLink Has Failed to Meet It's Burden of Proof	4
B. The Data Provided by CenturyLink is Insufficient to Sustain a Grant of Forbearance.....	6
III. CONCLUSION	10

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**THE REPLY COMMENTS AND OPPOSITION OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

I. INTRODUCTION AND SUMMARY

In response to the Public Notice issued January 14, 2014 (DA 14-36), by the Federal Communications Commission (“FCC” or “Commission”),¹ the New Jersey Division of Rate Counsel (“Rate Counsel”) hereby respectfully submits its reply and opposition to the Petition filed December 13, 2013, by CenturyLink requesting forbearance under 47 U.S.C. § 160(c) from enforcement of certain of the Commission’s dominant carrier regulations and certain *Computer Inquiry* tariffing requirements with respect to CenturyLink’s packet-switched and optical transmission services (hereafter

¹ / Federal Communications Commission Public Notice, “Pleading Cycle Established for CenturyLink’s Petition Seeking Forbearance from Enforcement of Dominant Carrier and Certain *Computer Inquiry* Requirements on Enterprise Broadband Services,” CenturyLink Petition for Forbearance, *CenturyLink’s Petition for Forbearance Pursuant to 47U.S.C. § 160(c) from Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, filed Dec. 13, 2013 (“*CenturyLink Petition*”).

“enterprise broadband services”). In particular, for Legacy CenturyTel,² CenturyLink seeks forbearance related to: Ethernet Transport, Ethernet Virtual Private Line, Local Transport – Synchronous Optical Channel, Synchronous Optical Channel Service, Custom Connect, Frame Relay Access Service, Asynchronous Transfer Mode Cell Relay Access Service, Video Frame Services – Type II; and for Legacy Embarq, forbearance on Ethernet Virtual Private Line and 270 Mbps Digital Video Transport Service (“DVTS”).³ For the reasons discussed below, Rate Counsel joins in support of the comments filed by Sprint-Nextel Corporation (“Sprint Nextel”), Comptel, and joint filers TW Telecom, Level 3, EarthLink and CBeyond, (hereafter collectively, “Commentators”), and respectfully submits that the Commission should deny CenturyLink’s request for forbearance.

Rate Counsel reiterates the arguments made in opposition to the numerous prior forbearance petitions, in particular the points addressed in its 2012 Comments in response to CenturyLink’s nearly identical 2012 Forbearance Petition filing and urges the Commission not to grant the forbearance requested herein.⁴ CenturyLink again fails to

² / That is, CenturyTel as it existed prior to the merger of CenturyTel and Embarq to form CenturyLink. Similarly, Legacy Embarq refers to that entity prior to the merger.

³ / Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Dominant Carrier and Certain *Computer Inquiry* Requirements on Enterprise Broadband Services, filed February 23, 2012 (“CenturyLink Petition”) as listed on Attachment A of the Petition.

⁴ / In the Matter of Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain *Computer Inquiry* Requirements on Enterprise Broadband Services, WC Docket No. 12-60, (“CenturyLink Petition”), Joint Initial Comments of NASUCA and Rate Counsel filed April 20, 2012 and Joint Reply Comments of the National Association of State Utility Consumer Advocates (“NASUCA”) and Rate Counsel filed May 7, 2012. *See also*; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Dockets 06-172 and 07-97, Comments and Reply Comments of NASUCA and Consumer Advocates on Remand, September 21, 2009 and October 21, 2009; *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Initial and Reply Comments of the New Jersey Division of Rate Counsel and NASUCA, March 7, 2008 and March 24, 2008; *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c)*

demonstrate that its requested relief is justified. CenturyLink has failed to show that any of the §160 criteria necessary to meet the burden of proof have been met and that therefore the relief sought is necessary. Moreover, echoing other commentators concerns, granting relief would further exacerbate a telecommunications service market which continues to be insufficiently competitive to discipline the behavior and performance of the largest market participants.

The numerous forbearances granted in the past seven years, exempting carriers from certain dominant carrier regulation and certain *Computer Inquiry* requirements under the Act have not yielded the promised or expected outcome of greater deployment and penetration of enhanced better services at lower prices and increased service quality. Indeed, a grant of CenturyLink's petition would detrimentally impact consumers and is contrary to the public interest. Moreover, the proposed relief is unwarranted because the record shows that CenturyLink has not been hindered in competing for the service for which forbearance is requested. Rate Counsel respectfully submits that the Commission should deny CenturyLink's Petition for Forbearance.

in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas, WC Docket 07-97, Initial and Reply Comments of the New Jersey Division of Rate Counsel, August 31, 2007 and September 28, 2007; Initial and Reply Comments of NASUCA, August 31, 2007 and October 1, 2007; *Petition of Qwest Corporation For Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 07-204, New Jersey Division of Rate Counsel, Public Counsel Section of the Washington State Attorney General's Office and NASUCA, Initial and Reply Comments, December 6, 2007 and December 21, 2007; *In the Matter of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 (c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements*, WC Docket No. 07-139, New Jersey Division of Rate Counsel, Initial and Reply Comments, August 20, 2007 and September 19, 2007; NASUCA, Initial and Reply Comments, August 20, 2007 and September 19, 2007; *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160 from Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket No. 05-342, New Jersey Division of the Ratepayer Advocate, Initial and Reply Comments, January 23, 2006 and February 10, 2006; NASUCA, Reply Comments, February 13, 2006; *Qwest's Petition for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Comments of the New Jersey Division of the Ratepayer Advocate, January 23, 2006.

II. DISCUSSION

A. CenturyLink Has Failed to Meet Its Burden of Proof

During the past several years and as a result of numerous forbearance proceedings filed before the Commission, the FCC has clarified and defined the standard that carriers need to meet in order to avail themselves of regulatory oversight. In applying Section 160 of the 1996 Act, the Commission has stated that it “is obligated to forbear under section 160(a) only if all three elements of the forbearance criteria are satisfied. Thus, the Commission ‘could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.’”⁵ CenturyLink has again failed to meet all three statutory requirements for forbearance set forth in Section 160(a). Herein, continued regulation is necessary because the evidence clearly demonstrates that CenturyLink retains market power and as such: 1) regulation is necessary to ensure the carriers’ practices and rates for telecommunications services are just and reasonable and are not unjustly or unreasonably discriminatory; (2) is necessary for the protection of consumers; and (3) therefore that continued regulation is in the public interest.⁶ In making its assessment of whether forbearance is in the public interest, the Commission must be guided by Section 160(b), which directs the Commission, to “consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the

⁵ / *I/M/O the Petition of Petition of Qwest Corporation for Forbearance to 47 U.S.C. §160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010), (*FCC Qwest Phoenix Forbearance Order and/or Phoenix Order*). *Qwest v. Federal Communications Commission, United States of America, et als.*, No. 10-9543, United States Court of Appeals for the Tenth Circuit, 689 F.3d 1214; 2012 U.S. App. LEXIS 16333; 56 Comm. Reg. (P & F) 762, August 6, 2012.

⁶ / 47 U.S.C. § 160(a).

extent to which such forbearance will enhance competition among providers of telecommunications services.”⁷

The FCC has been clear in the need and expectation that petitions for forbearance contain sufficient granular evidence to provide the FCC with a true picture of competition in the broadband industry. Unfortunately, CenturyLink’s filing is devoid of company specifics on any loss suffered as a result of operating under tariff requirements and other dominant carrier regulation. Rate Counsel submits that mere allegations by CenturyLink that disparate regulation such as price caps and tariffed rates have had “a significant negative impact on enterprise broadband customers and have precluded CenturyLink from effectively competing resulting in market loss, are insufficient without documented evidence as to the lack of market power.

Rate Counsel joins in commentators’ assessment that CenturyLink’s control of critical last-mile facilities in its service areas ensures that it retains market power in the provision of enterprise broadband services. CenturyLink can and has detrimentally affected CLECs’ abilities to effectively compete in the provision of these services. Furthermore, as noted by Comptel, the FCC is closely examining wholesale access to last mile facilities/services in the context of the technology transition, the pricing of special access services, the continued availability of TDM-based special access services, the availability of a functionally equivalent unbundled loop at the similar price, terms and conditions when copper facilities are replaced with fiber or another alternative facility.⁸ Clearly, CenturyLink’s control over last mile facilities and services belies its claims that

⁷/ 47 U.S.C. §160(b).

⁸ / Comptel Comments dated February 14, 2013, at pp 4-6, and *fn*s 11 through 17.

market share loss is the result of operating under an unfair regulatory framework. At the core of CenturyLink's basis for forbearance is the alleged revenue loss based on the fact that its proposals ("RFPs") were not selected.⁹ Rate Counsel submits that the selection of one carrier's proposal over another is based on a myriad of factors and is not indicative of nor the result of a disparate regulatory framework, or a non-level playing field, as CenturyLink would have the Commission believe.¹⁰

CenturyLink has failed to meet its burden of proof. CenturyLink has not shown that dominant carrier regulation of its packet-based special access services is no longer necessary to ensure rates, terms, and conditions that are just, reasonable, and not unjustly or unreasonably discriminatory. Therefore, CenturyLink has failed to demonstrate that its requested relief is justified. For the reasons discussed above, Rate Counsel respectfully urges the Commission to find that CenturyLink's Petition fails to demonstrate that the statutory criteria are satisfied and find that forbearance is unwarranted and contrary to the public interest.

B. The Data Provided by CenturyLink is Insufficient to Sustain a Grant of Forbearance

Industry reports predict that the market for U.S. Ethernet services will almost double by 2016, with revenue expected to increase from \$5.2 billion to \$9.2 billion.¹¹

⁹ / CenturyLink Forbearance petition at p. 47.

¹⁰ / Opposition Comments of TW Telecom, Level 3, Integra, Earthlink and Cbeyond to Centurylink's Forbearance Petition, at pp. 26-28.

¹¹ / Fierce Enterprise Communications: IDC: U.S. Ethernet Services Market to Almost Double by 2016; SMBs to adopt Ethernet as they move to VoIP, November 1, 2012; *at*: <http://www.fierceenterprisecommunications.com/story/idc-us-ethernet-services-market-almost-double-20>; See also: <http://www.computerweekly.com/news/2240203560/Enterprise-Ethernet-services-market-to-reach-62bn->; and <http://sg.finance.yahoo.com/news/global-enterprise-ethernet-services-market-033005717>.

Significantly, according to a Vertical Systems Group report, CenturyLink is the fastest-growing Ethernet provider in the United States. The report noted that CenturyLink's strategy is driven by next-generation products such as MPLS and Ethernet, in strategic enterprise markets and networks with reported revenues of \$346 million in Q4 2012, up 7.8 percent over Q4 2011.¹² In particular, during the first quarter of 2013, CenturyLink driven by strong sales of MPLS and Ethernet services to enterprise and government customers, strategic business revenues were \$615 million, up 6.4 percent year-over-year. Complementing its growing fiber-based Ethernet footprint, CenturyLink continued to expand its Ethernet over Copper (EoC) footprint to over 3,300 COs (central offices), making CenturyLink one of a handful of top performing contenders for these services.¹³ Likewise, other industry reports confirm CenturyLink among the top five providers of Ethernet service controlling as much as 90% of market revenue.¹⁴

Data contained in several reports submitted by CenturyLink in Confidential Attachments 5, 13, 15 and 18 of its Petition show that alleged competitive disadvantages do not in fact exist, and undercut CenturyLink's claim that it cannot compete without regulatory forbearance. The data clearly shows that CenturyLink has not only been able to compete, but remains one of the dominant providers in the competitive Ethernet

¹² / Firec Telecom Reports: CenturyLink, Windstream, other incumbents rise to the Ethernet occasion , by Sean Buckley, March 26, 2013: <http://www.fiercetelecom.com/special-reports/centurylink-windstream-other-incumbents-rise-ethernet-occasion#ixzz2u7nK1Hh1>.

¹³ / Centurylink Consumer Revenue Up In Q1, Includes Carrier Ethernet, FierceTelecom, May 9 2013, at: <http://www.carrierethernetnews.com/articles/633883/centurylink-consumer-revenue-up-in-q1-includes-car/>.

¹⁴ / AT&T Tops Verizon, Centurylink, Others in Latest Ethernet Rankings, by Craig Galbraith, August 20, 2013, at <http://www.channelpartneronline.com/news/2013/08/at-t-charter-business-top-latest-ethernet-ranking.aspx>.

market.¹⁵ Moreover, if such competition existed, one would expect service quality to increase, or rates to decline, or both.¹⁶ CenturyLink's data provides no empirical evidence of either.

CenturyLink's own Confidential Attachments show that CenturyLink has not been detrimentally affected by the regulatory framework under which it operates. CenturyLink's Confidential Attachments 15 and 18 show that CenturyLink has maintained its market share for wholesale services and supplier of last-mile connectivity.¹⁷ The remaining wholesale service providers control a small portion of the left over market.¹⁸

As previously stated by Rate Counsel in numerous comments filed in other forbearance proceedings before the Commission, the internet marketplace is as equally concentrated as the enterprise market and in both markets competitors are able to compete. Forbearance of dominant carrier and *Computer Inquiry* regulations for these carriers has not resulted in bridging the digital divide. Therefore, continued application

¹⁵ / CenturyLink Petition, Confidential Attachment 5, Frost & Sullivan Market Engineering Report, titled Analysis of Wholesale Carrier Ethernet Services Market, 2012, Mobile Backhaul and Retail Market Trends Fuel Revenue Growth, at pp. 32-52.

¹⁶ / National Bureau of Economic Research (NBER) Working Paper Series titled: *Evidence of a Modest Price Decline in US Broadband Services*, by Shane Greenstein and Ryan C. McDevitt - Working Paper 16166, dated July 2010, pp. 3-5, and at *fns.* 3-7, and Table 1 at p. 9, p. 26 at fn 38 and pp. 28-29, publicly available document at: <http://www.nber.org/papers/w16166>.

¹⁷ / CenturyLink Petition, Confidential Attachment 15, Frost & Sullivan Market Engineering Report, titled: Mid-Band Ethernet Services: Next New Thing in Business Last-Mile Connectivity at pp. 22-25; and Confidential Attachment 18, IDC Industry Report, titled: Market Analysis Perspective: U.S. Carrier Ethernet and IP VPN Network Services, 2012 at pp. 17-20.

¹⁸ / AT&T, Verizon Ethernet dominance challenged by tw telecom, Cox and other competitors, dated September 5, 2013 at AT&T, Verizon Ethernet dominance challenged by tw telecom, Cox and other competitors-FierceTelecom <http://www.fiercetelecom.com/special-reports/att-verizon-ethernet-dominance-challenged-tw-telecom-cox-and-other-competit#ix222u7IDzho>; See also: FierceTelecom: <http://www.fiercetelecom.com/special-reports/att-verizon-ethernet-dominance-challenged-tw-telecom-cox-and-other-competit>. See also CenturyLink Petition, at Confidential Attachment 15, pp. 22-25.

of dominant carrier regulation and certain *Computer Inquiry* tariffing requirements are necessary to ensure continued safe and adequate services and to ensure that charges, practices, and services are not unjustly or unreasonably discriminatory, in furtherance of the public interest.¹⁹

Rate Counsel joins other commentators²⁰ in reiterating that CenturyLink has failed to provide the empirical evidence required to demonstrate that dominant carrier regulation of its packet-based special access services (1) is no longer necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions; (2) is no longer necessary to protect consumers; and (3) is in the public interest as required under section 160(a). Rate Counsel submits that CenturyLink's allegations of competitive disadvantages lack empirical support. In the past several years incumbent LECs have taken advantage of the lack of adequate regulatory oversight to blatantly engage in anti-competitive practices which have permitted them to exploit their market and have curtailed the emergence and growth of a more competitive and level playing field. Rate Counsel agrees with Sprint's observations that the lack of regulatory oversight has facilitated the incumbent LEC's ability to "exploit their market power in harmful ways – charging above-cost rates; maintaining wholesale prices that are high relative to their own retail rates in order to squeeze the non-ILECs' margins and limit the

¹⁹ 47 U.S.C. § 160(a).

²⁰ See *Opposition Comments* filed by commentators, In the Matter of CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. Section 160(c) from Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements on Enterprise Broadband Services; CenturyLink's Alternative Petition for Interim Waiver of Dominant Carrier Regulation and *Computer Inquiry* Tariffing Requirements Imposed on Enterprise Broadband Services; Sprint Comments in WC Docket 14-9, dated February 13, 2014, at pp.2-4, and Comptel Comments in WC Docket 14-9, at pp. 1-2 and 11-13 and fn's 31 and 32; and TW Telecom, Level 3, Integra, Earthlink and Cbeyond Comments in WC Docket 14-9, dated February 14, 2014, at pp. 12-16.

size of their addressable markets; and implementing restrictive terms and conditions which limit non-ILECs' ability to upgrade from TDM to Ethernet special access services."²¹ Rather it would impose further barriers on competitors' ability to obtain the necessary wholesale inputs to serve their business customers. As aptly stated by commentators, "CenturyLink fails to show that it is now, or will be anytime in the foreseeable future, subject to sufficient facilities-based competition in the provision of packet-based special access services in the legacy CenturyTel and legacy Embarq regions to justify forbearance. Nor does CenturyLink proffer any additional "evidence" that demonstrates that forbearance is warranted."²²

III. CONCLUSION

For the reasons discussed above, Rate Counsel respectfully urges the Commission to find that CenturyLink's Petition fails to demonstrate that the statutory criteria are satisfied and that forbearance is unwarranted and contrary to the public interest.

Respectfully submitted,

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²¹ / Sprint Comments at p. 3.
²² / Comptel at p. 2.